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Kuwait Rocks Co v AMN Bulkcarriers Inc

Even before the collapse in market rates it has been a long running debate. How many unpaid instalments of hire amount to a repudiatory breach?

The initial question is why that is important. Almost any time charter contains some kind of provision allowing an owner to withdraw the ship failing punctual payment of hire. What that overlooks, however, is that exercising this right in itself does not give rise to rights for future hire.

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$13M

It may seem like an academic distinction, but in financial terms it will often make a very significant difference. In this particular case (albeit that there is a hearing on quantum pending) something around US$13 million.

Mr Justice Flaux in the English High Court may have provided an answer and it is a surprising one. This is that it is one instalment. The way in which he achieves this is to characterise the requirement to pay hire punctually in accordance with the contract terms as a condition in the full legal sense of that term. As a matter of general English contract law, the breach of a condition will permit the innocent party to treat the contract as at an end.

It is, therefore, a very neat and clean solution to the question. It is surprising because it is very much at odds with what was thought to be the position. The general orthodoxy was that payment of hire was not a condition in the full sense of that term.

It would be characterised either as a warranty or as an innominate term. Breaches of these give the innocent party the right to damages but not to treat the contract as at an end. Such breaches can be elevated into repudiatory conduct but essentially it needs to be shown that they are evincing an intention not to be bound by the contract or are depriving the innocent party of substantially the whole benefit of it.

It can immediately be seen how subjective and fact based this will be, hence the endless head scratching it has given rise to in the context of unpaid hire. An owner really doesn't want to get the point wrong and lose the right to claim substantial damages. That is why, just looking at the various cases reviewed by Flaux J, there must have been something like a century of lawyers chewing over this with their clients.

The problem, if there is one, with Flaux J's judgment is that it does appear to be at complete odds with, at least, one previous Commercial Court case. This is the BRIMNES which, although Flaux J did not accept this, also appeared to have approval from the Court of Appeal.

It is also against a background where it is contrary to the views expressed in the leading text book on time charters. It is also interesting that the opportunity had arisen to test the point before the Supreme Court in the recent case of the

Kuwait Rocks Co v AMN Bulkcarriers Inc
continued

KOS. The owner decided, however, not to run that argument and won on other grounds. In fact, it goes a little further than this in that as the case progressed up through the courts both parties essentially accepted that the non payment of a single instalment of hire could not amount to a repudiation of the charterparty.

Turning back to this case itself, the facts are very typical but a stark illustration of just how difficult it is for arbitrators to apply the existing, or at least then existing, law.

What we have is a five year time charter entered into on NYPE terms back in late 2008. It will come as a shock to few that in the light of the tumbling market it turned out that the charterer had fixed the ship at rates above those it could then achieve with sub-charterers. A number of commercial solutions and agreements were agreed. Matters had come to a head much earlier but, at the end of the day, a single payment of hire was unpaid in time.

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Amongst other grounds, the owner elected to treat this as a repudiatory breach and brought the charter to an end.

Insofar as regards the non payment of hire the arbitrators sided with the charterer. For them it was not a repudiatory breach. It is clear that they wanted to find that it was but felt the existing case law was against them on this.

Flaux J disagreed with the arbitrators and held that the payment of hire was a condition, a breach of which entitled the owner to cancel the contract.

So what does this mean? Firstly, the debate rages as to whether this judgment is binding or just an expression of a view. On the one hand it is not the underlying reason for the finding in the owner's favour, that involved wider considerations. On the other hand Flaux J was considering the owner's cross appeal in isolation and made unequivocally firm findings on that.

The jury, as they say, is out. It would, however, be open to a robust tribunal even at arbitration level to say it is not binding on them.

Secondly, often a charterer does not pay a hire instalment either at all or in full because they say there are counter-claims it is entitled to set off. Once upon a time, a charterer was fairly safe doing that because even if they were wrong it was not going to be in repudiatory breach.

On the other side, the advice to the owner is now that it could have a much clearer option to treat the charterer as in repudiation.

These questions will probably only be answered once the market improves and owners have good reasons to seek fixtures elsewhere if their existing charterer is not paying in full and on time.

If Members have any questions about the judgment please contact your usual contact at your local Managers' office.

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